

No. 12,679

IN THE
United States
Court of Appeals
For the Ninth Circuit

COWDEN LIVESTOCK Co., a corporation,

Appellant-Plaintiff,

vs.

HOWARD BROWN, individually and as surviving partner of the copartnership of Sinton & Brown, and SINTON & BROWN, a copartnership composed of Howard Brown and Richard Roe Sinton and John Doe Sinton,

Appellees-Defendants.

Appellees-Defendants' Answering Brief

Upon Appeal from the District Court of the United States
for the District of Arizona

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Plaintiff's appeal seeks to have this Honorable Court increase the lower court's judgment by the amounts which plaintiff allegedly owes (1) Porter and (2) the assignee of the deceased Adams, in each instance, \$6,409.02. Complete rebuttal to all of plaintiff's contentions is found in de-

fendants' Opening Brief on their appeal. There is, however, another reason why plaintiff's contentions are fallacious: the elementary rule of law is that the payment of a debt by one who is not a party to the contract, although made without assent of the debtor, extinguishes the debt. 40 *Am. Jur.*, p. 726, Sec. 22.* This is only to say that: "A payment or other performance by a third person, accepted by a creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered it. . . ." *Restatement of the Law of Contracts*, Section 421; see *Grouf v. State Nat. Bank of St. Louis*, 76 F.2d 726, 730 (C.C.A. 8 1935).

The facts here are that defendants paid Adams (the plaintiff's alleged creditor) his \$6,409.02 and plaintiff knew thereof and acquiesced therein. Plaintiff's president testified:

"Q. You knew (at the time of the plaintiff-Adams settlement) that Mr. Adams had directly collected his part of the proceeds?

A. That is true, he said he had." (R. 96)

It was subsequent to this (after October 3, 1947) that plaintiff received notification of Adams' assignment to the Slash Cattle Company (R. 174-177) and defendants never were advised of such assignment.

With respect to the \$6,409.02 allegedly owed Porter, which defendants paid Adams, Porter's testimony was:

"Q. Mr. Porter, have you written off on your books those \$6,000 that would have been coming to you had

*The citations contained in plaintiff's opening brief are so clearly not in point as to be unworthy of comment.

the settlement been completed by the payment of the money?

A. When I heard Roy Adams killed himself, I did. (R. 197)

Q. Just one more thing on that, Mr. Porter. You wrote it off, I believe, this \$6,000, when you found out that Roy Adams had committed suicide, isn't that true?

A. Well, in fact I had wrote it off before then.

Q. You wrote it off because Roy Adams was in a poor financial condition, to your knowledge, isn't that right?

A. That is right.

Q. You didn't think you could collect it from Roy Adams?

A. I didn't see a chance." (R. 205, 206).

Even if the following testimony of Porter:

"Q. Are you at the present time, George, looking to the Cowden Livestock Company to collect your portion of the gain or profit on those cattle?

A. I'd appreciate it.

Q. You would expect it?

A. You bet." (R. 196),

could be construed as a non-affirmance by Porter of Adams' collection of his (Porter's) part of the proceeds, that non-affirmance did not come until February, 1949, seventeen months after the plaintiff-Adams settlement at which Adams purported to act on behalf of Porter (R. 95), and approximately the same amount of time after Porter had written off the Adams debt to him. (R. 197, 205, 206) A clearer case of ratification could hardly be made out.

For the reasons stated above and in their opening brief defendants' respectfully request the Court to enter judgment in their favor.

Respectfully submitted,

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